GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-133

LUIS ALVAREZ,
Claimant-Respondent,

v.

RESTAURANT ASSOCIATES CORPORATION,
and GALLAGHER BASSETT SERVICES
Employer/Insurer-Petitioner.

Appeal from a September 30, 2013 Compensation Order on Remand By
Administrative Law Judge Gerald Roberson
AHD No. 10-343B, OWC No. 662108

John Noble, for the Claimant-Respondent
Julie Murray, for the Employer/Insurer-Petitioner

Before HEATHER C LESLIE, HENRY W. MCCOY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer/Insurer-Petitioner (Employer) of the September 30, 2013, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ granted the Claimant's request for temporary total disability benefits from February 11, 2010 to February 17, 2010 and from February 24, 2010 to the present and continuing. We AFFIRM.

BACKGROUND AND FACTS OF RECORD

The Claimant was employed by the Employer as a dishwasher. On July 25, 2009 the Claimant slipped and fell on a wet surface. The Claimant injured his left knee. After receiving treatment

at the emergency room at Howard University Hospital, the Claimant came under the care of Dr. A. Roy Rosenthal and Dr. Andrew Siekanowicz. An MRI subsequently revealed a meniscal tear which required surgery on October 27, 2009.

The Claimant continued to follow up with Dr. Siekanowicz following surgery. Dr. Siekanowicz recommended physical therapy and prescribed medication post surgery. On February 24, 2010, Dr. Siekanowicz recommended work hardening and work conditioning over a course of eight weeks. Ultimately, Dr. Siekanowicz released the Claimant to light duty work only.

The Employer sent the Claimant for several independent medical evaluations (IME) with Dr. David Johnson. Dr. Johnson evaluated the Claimant on February 18, 2010, July 1, 2010, April 7, 2011 and March 16, 2012. At the last IME, Dr. Johnson opined that the Claimant could return to work as a dishwasher, an opinion he had expressed after the IME's of July 1, 2010 and April 7, 2011. Dr. Johnson also opined the Claimant was at maximum medical improvement and required no further care.

The Claimant did attempt to return to work on two occasions. On the first occasion, the Claimant was asked to wrap utensils in napkins. After 30 minutes, the Claimant was unable to perform this task and was asked to go home. In September of 2010, the Claimant attempted again to return to work, however, was unable to do so as the schedule presented was full duty.

A full evidentiary hearing occurred on September 17, 2012. The Claimant sought an award of temporary total disability benefits from February 11, 2010 to the present and continuing as well as authorization for pain management. The issues raised were whether or not the Claimant's need for pain management was medically casually related to the work injury, the nature and extent of the Claimant's disability, and whether the Claimant voluntarily limited his income. A CO was issued on November 8, 2012 which granted the Claimant's claim for relief.

The Employer timely appealed to the CRB. The Employer argued the ALJ's erred in not finding that the Claimant voluntarily limited his income in February 2010, and the ALJ erred in awarding temporary total disability and pain management in light of normal objective findings. The Claimant opposed the Application for Review, arguing the CO is supported by the substantial evidence in the record and should be affirmed.

A Decision and Remand Order (DRO) was issued on August 14, 2013 which affirmed the CO's finding that the left knee condition and post traumatic arthritis were medically causally related to the work injury. The DRO also affirmed the award of pain management and the finding that the Claimant was restricted to light duty. The CRB concluded however that the CO's conclusion that the Claimant voluntarily limited his income in February 2010 was not supported by the substantial evidence in the record. The CRB remanded the case for further findings of fact and conclusions of law.

A COR was issued on September 30, 2013. In that COR, the ALJ granted Claimants request for temporary total disability benefits from February 11, 2010 to February 17, 2010 and from February 24, 2010 to the present and continuing. The ALJ determined that Claimant had voluntarily limited his income from February 18, 2010 to February 23, 2010.

The Employer timely appealed. The Employer argues that the ALJ erred in finding Claimant did not voluntarily limit his income after February 24, 2010, that the objective evidence supports a

finding that the Claimant voluntarily limited his income, and that even if Claimant was found not to have voluntarily limited his income beginning on February 18, 2010, the Claimant is not entitled to temporary total disability after September 2010 as he failed to accept full duty work he was capable of performing per the IME of Dr. Johnson.

The Claimant opposes the Application for Review, stating the COR is supported by the substantial evidence in the record and is in accordance with the law.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("CRB") is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501, *et seq*., ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

DISCUSSION AND ANALYSIS

The Employer first argues that the ALJ erred in finding the Claimant did not voluntarily limit his income beginning February 24, 2010. Specifically, the Employer argues that as Claimant voluntarily limited his income by refusing a light duty job he was capable of performing, after the functional capacity evaluation (FCE) released him to work light duty on March 2, 2010 the Employer did not have to then re-offer the exact same job to Claimant. The Employer cites *Burge v. DOES*, 842 A.2d 661 (2006) and the video surveillance for support. The Employer argues "the law does not require the Employer to then re-offer the exact same job to the Claimant less than two weeks later when the Claimant had already refused to complete the same." Employer's argument at 10. We disagree.

As the Employer points out, the Claimant was restricted from working after February 24, 2010 for several periods of time. The March 2, 2010 FCE concluded the Claimant capable of light duty work. Pursuant to *Logan v. DOES*, 805 A.2d 237 (2002), the employer must present sufficient evidence of suitable job availability to overcome a finding of total disability.[1] As the ALJ correctly pointed out,

[1] *Logan* further concluded, when defining total disability, "[a] claimant suffers from *total* disability if his injuries prevent him from engaging in the only type of gainful employment for which he is qualified." *Washington Post v. District of Columbia DOES*, 675 A.2d 37, 41 (D.C. 1996) (emphasis added); *see also Washington Metro. Area Transit Auth. v. DOES*, 703 A.2d 1225, 1229 (D.C. 1997). "Total disability does not mean absolute helplessness, . . . and the claimant need not show that he is no longer able to do any work at all." *Washington Post,* 675 A.2d at 41 (internal citations omitted). Instead, "an employee who is so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled." *Id.* (quoting 4 LARSON, *supra*, § 83.01, at 83-2); *see also Lee v.*

> Where an employee "voluntarily limits his or her income or fails to accept employment commensurate with the employee's abilities, the employee's wages after the employee becomes disabled shall be deemed to be the amount the employee would earn if the employee did not voluntarily limit his or her income." D.C. Code §§ 32-1508 (3)(V)(iii) (2001). *The burden is on an employer to demonstrate the availability of a job that an injured employee is capable of performing*. (Emphasis added.)

COR at 4.

Thus, after March 2, 2010 when the Claimant was released to light duty after a period of total disability, it was incumbent on the Employer to demonstrate the availability of a suitable job to satisfy its burden. The ALJ found the Employer failed in this burden by not offering a job within his restrictions after February 24, 2010. Indeed, the Employer concedes this in arguing that it was not required to as the Claimant failed to perform his light duty job two weeks prior to February 24, 2010.

The ALJ stated,

> In this case, the evidence establishes the treating physician released Claimant to light duty for various periods and he found Claimant totally disabled for various periods as well. The record does not include any formal job offers. Without the benefit a formal written job offer, the record will serve as a basis for determining when Employer offered Claimant employment, and whether the nature of the employment complied with Claimant's medical restrictions. In terms of the February 2010 job offer, the record reveals Dr. Johnson released Claimant to sedentary employment on February 18, 2010. Claimant testified he returned to light duty in February 2010, and the position required him to sit at a table and roll silverware. HT pp. 24 and 37. While Claimant testified he became incapacitated and unable to perform the light duty assignment, the record reveals the assignment did not violate the light duty medical restrictions imposed by Dr. Johnson. The deposition testimony of Dr. Siekanowicz also establishes the February 2010 job offer complied with his recommendations of sedentary employment. On June 4, 2012, Dr. Siekanowicz agreed performing work at a table was sedentary. EE 6, Depo at 24.
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> During his deposition, Dr. Siekanowicz acknowledged Claimant remained symptomatic following surgery. EE 6, Depo at 10-11. Dr. Siekanowicz testified Claimant was progressing on February 24, 2010, four months post-surgery, but given how much meniscus had to be removed it was not unusual that Claimant was still having symptoms at four months. EE 6, Depo at 11. Dr. Siekanowicz also testified he released Claimant from all employment on February 24, 2010. Dr. Siekanowicz stated Claimant was incapable of working on February 24, 2010.

Minneapolis St. Ry. Co., 230 Minn. 315, 41 N.W.2d 433, 436 (Minn. 1950). That is to say, the proof requirement stated by the hearing examiner that the claimant cannot return to "*any other*" employment does not include "services . . . so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Washington Post*, 675 A.2d at 41.

EE 6, Depo at 11. Dr. Siekanowicz indicated Claimant was having way too many symptoms at that point. He remarked "so at that point usually physical therapy in the acute phase, eight to twelve weeks" is required with the next logical thing would be work hardening/work conditioning. EE 6, Depo at 11-12. Dr. Siekanowicz subsequently testified Claimant received a light duty release on March 2, 2010 following a functional capacity evaluation. Dr. Siekanowicz testified Claimant required a cortisone injection on April 15, 2010 due to persistent symptoms, and was placed off of work. Dr. Siekanowicz testified regardless of the findings on the FCE, Claimant was not capable of working on April 15, 2010, and his records revealed Claimant had not started the work hardening program at that point. EE 6, Depo at 16. Dr. Siekanowicz indicated Claimant could try light duty on May 26, 2010. EE 6, Depo at 17. Given his medical restrictions, the record reveals Claimant failed to work light duty consistent with his medical restrictions from February 18, 2010 to February 23, 2010. While Claimant received a light duty release on May 26, 2010, the record does not disclose whether Employer made light duty available on May 26, 2010. As such, the record reveals Claimant voluntarily limited his income from February 18, 2010 to February 23, 2010. Notwithstanding the fact the light duty job offer may have permitted Claimant to extend his leg away from himself while seated, the record reveals the treating physician rendered him totally disabled on February 24, 2010. Dr. Siekanowicz has provided sufficient medical rationale to support Claimant's total disability status on February 24, 2010, noting Claimant remained symptomatic given the nature of the surgery performed, the size of the meniscus tear and the development of arthritis.

The record contains evidence Employer offered Claimant employment in September 2010. Claimant testified Employer offered him his full duty job in September 2010. HT p. 31. The duties of the position included collecting the dishes from customers and placing them in the dishwasher, and then running to the next station. He would spend 8-9 hours a day just standing. HT p. 21. Claimant testified he returned to work in September 2010, and the posted schedule had him at a full schedule requiring him to perform all the responsibilities of his job. HT pp. 25-26. Claimant indicated he was unable to do the job because he experienced leg pain. Claimant's testimony appears to be consistent with the records from the treating physician. Dr. Siekanowicz testified his office note indicated Claimant attempted to do light duty work on September 23, 2010, and he was sent home by Employer because there was no light duty work available. EE 6, Depo at 21. Dr. Siekanowicz testified Claimant could not have returned to work as a dishwasher at any time following his surgery. EE 6, Depo at 28-29. Dr. Siekanowicz stated he did not agree with Dr. Johnson's assessment that Claimant could return to full duty. Dr. Siekanowicz remarked Dr. Johnson identified Claimant's condition as a small tear which was incorrect because a subtotal meniscectomy involves almost taking out the whole meniscus. Dr. Siekanowicz explained Claimant was severe enough where he was already developing posttraumatic arthritis, and he had Claimant evaluated for a possible

> joint replacement or an osteotomy where you cut the bone to offload the affected side. EE 6, Depo at 29-30. Given the medical rationale from Dr. Siekanowicz, the record establishes Claimant could not perform the offered employment of September 2010, and therefore, Claimant did not voluntarily limit his income during this period as alleged by Employer.

COR at 4-6.

We find no fault in the above analysis. Moreover, we find *Burge* to be dissimilar to the case at bar. In *Burge*, the Claimant did not return to work as a professional basketball player because of non work related reasons.[2] In the case before us, the Claimant testified at the Formal Hearing that if offered a light duty job, he would try. Hearing transcript at 37. No testimony was elicited indicating that the Claimant was not interested in returning to employment with the Employer. We find the Employer's argument unpersuasive.

The Employer relies upon the video surveillance and the FCE as objective evidence the Claimant voluntarily limited his income and that the ALJ erred in finding otherwise. We refer the Employer to the above discussion regarding the FCE and the opinion of Dr. Seikanowicz. Regarding the video surveillance, the ALJ found in the CO,

> At the hearing, Employer offered the testimony of Deborah Donohue, an insurance investigator, who conducted surveillance of Claimant on August 11, 14, 15 and 20, 2012. HT p. 44. Ms. Donohue videotaped Claimant for approximately 8.5 hours over this four day period. HT p. 45. She testified Claimant spent a great deal of time sitting on his front steps, and he walked a block away from his home to a bench where he sat and talked to other individuals. HT p. 48. Ms. Donohue testified she witnessed Claimant sitting for more than 10 minutes at a time. HT p. 49. The surveillance videotape also showed Claimant using a cane and walking with a limp. While the videotape evidence does show Claimant sitting on a number of occasions, it does not offer any insight regarding whether Claimant experienced any stiffness or discomfort as a result of sitting. Claimant testified Employer asked him to go home after he attempted to perform the tasks of the light duty assignment in February 2010. HT p. 25. The record reveals Claimant developed arthritis following his surgery in October 2009, and his treating physician has stated the development of arthritis would cause knee stiffness, causing problems with prolonged sitting. Given Claimant's testimony along with the medical findings of Dr. Siekanowicz, the record does not contain sufficient evidence to support Employer's contentions that Claimant voluntarily limited his employment as contemplated by Section 32-1508 (3)(V)(iii) of the Act.

CO at 13.

The ALJ discounted the video surveillance addressing the arguments put forth on appeal, that the video shows the Claimant sitting for a prolonged period of time. The ALJ's analysis and

[2] The Claimant in *Burge* testified she "lacked a desire to return to basketball after the Mystics released her because she was more interested in settling down and having a family." *Burge*, 842 A.2d at 665-666.

conclusion is supported by the evidence in the record and in accordance with the law. We will not disturb this conclusion.

Finally, the Employer argues that the ALJ erred in discounting the opinion of Dr. Johnson and that there is no objective evidence to support Claimant's continuing disability. However, as we discussed in our prior DRO, it was not error for the ALJ to find more persuasive the opinion of the treating physician.[3]

As we stated,

> The ALJ also found the opinion of Dr. Sikanowicz preferential over that of the Employer's IME physician, Dr. Johnson when awarding temporary total disability. Specifically,
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> > The testimony and medical findings of Dr. Siekanowicz provide sufficient medical rationale to support entitlement to temporary total disability benefits. Dr. Siekanowicz has offered medical findings to establish Claimant had a significant meniscus tear as a result of the work incident, and the development of arthritis following the surgery caused residuals precluding the performance of pre-injury employment. The FCE also documented Claimant's limitations, and found he could only perform sedentary to light duty. While Dr. Johnson's assessment indicated Claimant could perform his regular employment as a dishwasher, Dr. Johnson failed to consider the severity of Claimant's injury and the development of post-surgical arthritis. Therefore, the medical evidence and Claimant's testimony support entitlement to temporary total disability benefits from February 11, 2010 to the present and continuing due to residuals related to the work incident of June 25, 2009.
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> CO at 12.
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> We find no fault with the above analysis. In essence, what the Employer is asking us to do is to re-weigh the evidence in their favor finding the opinion of Dr. Johnson more persuasive then that of Dr. Siekanowicz, a task we cannot do. As we stated above, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra.*

DRO at 4.

We reiterate our analysis above and find the ALJ's reliance on the treating physician's opinion to be supported by the substantial evidence in the record and in accordance with the law.

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[3]It is well settled in the District of Columbia that in situations where there are conflicting medical opinions, the opinion of the treating physician is preferred over those of physicians retained simply to examine the claimant for the purposes of litigation. *Stewart v. DOES ,* 606 A.2d 1350 (D.C. 1992).

CONCLUSION AND ORDER

The September 30, 2013 Compensation Order on Remand is supported by the substantial evidence in the record and in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ *Heather C. Leslie*
HEATHER C. LESLIE
Administrative Appeals Judge

January 24, 2014
DATE